

JERRY LEASE

IBLA 94-650

Decided July 22, 1997

Appeal from a determination of the Nevada State Office, Bureau of Land Management, declaring two lode mining claims null and void ab initio. NMC 689718 and NMC 689719.

Affirmed.

1. Mining Claims: Lands Subject To

Lode mining claims located on land closed to mineral entry were properly declared null and void ab initio. Where land was explicitly withdrawn from entry by an Act of Congress, a mining claimant may not establish rights through a mining claim located after the effective date of the statute.

APPEARANCES: Gary D. Babbitt, Esq., Boise, Idaho, for Jerry Lease.

OPINION BY ADMINISTRATIVE JUDGE BURSKI

Jerry Lease has appealed from a determination of the Nevada State Office, Bureau of Land Management (BLM or Bureau), issued on June 24, 1994, that the CAL #1 and CAL #2 lode mining claims, NMC 689718 and NMC 689719, were null and void ab initio because the claims had been located on lands "not open [to mineral entry] at the time of location."

Notices of location for the subject claims were filed with BLM on December 21, 1993. These notices aver that the two claims were located on October 22 and 23, 1993, and are situated in T. 17 S., R. 54 E., Mount Diablo Meridian, Nye County, Nevada. 1/ Maps depict the claims as within

1/ According to Lease, a claim covering this land was initially located on Feb. 26, 1992. When it was discovered that this claim was in conflict with other claims held by third parties, it was withdrawn. These other claims were subsequently deemed abandoned and void for failure to submit the annual rental fees required by the Department of the Interior and Related Agencies Appropriations Act for Fiscal Year 1993, Pub. L. No. 102-381, 106 Stat. 1378-79 (1992) and 43 C.F.R. § 3833.1-5. Lease related that, upon notification that these prior claims had been deemed abandoned and void, notices of discovery were posted on Aug. 14, 1993 (CAL #1) and Oct. 2, 1993 (CAL #2). These two claims were then formally located as specified in the location notices.

sec. 7 of the identified township. Upon receiving a mining plan of operations for these claims, the U.S. Forest Service alerted BLM to the fact that these claims were located within the Mount Stirling area of the Spring Mountains National Recreation Area. Based on this information, on June 6, 1994, BLM initially declared the subject claims null and void ab initio, on the grounds that the lands encompassed therein "were segregated effective April 26, 1989, pursuant to the National Forest and Public Lands of Nevada Enhancement Act of 1988." The Bureau, however, vacated this decision on June 24, 1994, and declared the claims null and void because the lands described "were segregated on August 4, 1993, pursuant to the Spring Mountains National Recreation Area [SMNRA] Act (P.L. 103-63), withdrawing the lands from all forms of entry, appropriation, or disposal under the public land laws."

In a Statement of Reasons for Appeal (SOR) dated May 29, 1996, Lease alleges that BLM has misconstrued the SMNRA Act, arguing that, under section 4(c), 107 Stat. 297, 16 U.S.C. § 460hhh-2 (1994), its effectiveness was contingent upon the filing by the Secretary of the Interior of a map depicting the lands within the SMNRA with the Committee on Energy and Natural Resources. Lease contends that, at the time the claims were located, "the withdrawal of the land from the Toiyabe National Forest into the Spring Mountain National Recreation area had not been effected" because the withdrawal "was not noted on the Master Title plat until April 8, 1994." (SOR at 2.)

Lease asserts that the controlling rule in this instance is that "withdrawn lands which are not withdrawn effectively upon the passage of the legislation do not become withdrawn until the withdrawal is properly noted on the land office records." *Id.* He therefore contends that the lands encompassed by the subject mining claims were open to mineral entry when located and, as a result, BLM's decision is incorrect.

fn. 1 (continued)

In a submission received on Dec. 21, 1994, Lease suggested that the presence of these previous claims showed that "there was no break in the holding of these mining claims from before the Acts were passed to the present." We do not agree. To the extent that Lease attempts to rely on the previous claims of third parties, we note that his subsequent claims were clearly relocations adverse to the original claims and he could assert no benefits from the original locations. See generally, R. Gail Tibbetts, 43 IBLA 210 (1979). To the extent that Lease purports to rely on the location which he and his partners made on Feb. 26, 1992, we note that this location was voluntarily withdrawn by the locators and cannot serve as the basis of any right. Finally, to the extent that Lease relies on the continued holding by him and his partners of the lands embraced by the claim, we note that the claimants could not assert rights under 30 U.S.C. § 38 (1994) since it is admitted that an adverse claim existed, see United States v. Webb, 132 IBLA 152, 181 (1995), and further that, absent location of a claim, no rights inure to a discovery as against the United States. See Belk v. Meagher, 104 U.S. 279, 284 (1881).

[1] We note, as an initial observation, that it is well-established that a mining claim located on land closed to location and entry under the mining laws is null and void ab initio. See Lucian B. Vandegrift, 137 IBLA 308 (1997); Merrill G. Memmott, 100 IBLA 44 (1987). The sole question presented by this appeal is whether the lands on which the claims were located were open to mineral entry at the time of location. We believe the answer is clearly in the negative.

Section 4 of the SMNRA Act, 16 U.S.C. § 460hhh-2 (1994), provides:

(a) In general

Subject to valid existing rights, there is established the Spring Mountains National Recreation Area in Nevada.

(b) Boundaries and map

The Recreation Area shall consist of approximately 316,000 acres of federally owned lands and interests therein in the Toiyabe National Forest, as generally depicted on a map entitled "Spring Mountain National Recreation Area--Proposed", numbered NV-CH, and dated August 2, 1992.

(c) Map filing

As soon as practicable after August 4, 1993, the Secretary shall file a map of the Recreation Area with the Committee on Energy and Natural Resources of the Senate and the Committee on Natural Resources of the House of Representatives.

(d) Public inspection

The map shall be on file and available for public inspection in the offices of the Chief of the Forest Service, Department of Agriculture.

(e) Discrepancies

In the case of any discrepancy between or among the acreage referred to in subsection (b) and the map described in subsection (b), the map described in subsection (b) shall control any question concerning the boundaries of the Recreation Area.

Under section 8(a)(2) of the SMNRA Act, 16 U.S.C. § 460hhh-6(a)(2) (1994), all Federal lands included within the recreation area, with certain exceptions not involved herein, were withdrawn, inter alia, from all forms of appropriation, entry, and patent under the mining laws.

As noted above, Lease argues that the withdrawal was not effective upon passage of the Act because the establishment of the SMNRA was dependent upon the filing by the Secretary of the Interior of a map depicting

the area involved with the responsible Senate and House Committees. This reading of the statute is in error in several respects.

First of all, we must point out that the reference to "Secretary" in section 4(c), 16 U.S.C. § 460hhh-2(c) (1994), refers to the Secretary of Agriculture, not the Secretary of the Interior. See 16 U.S.C. § 460hhh(3) (1994). More fundamentally, it is clear from section 2(a) that the establishment of the SMNRA was effectuated by the adoption of the SMNRA Act by Congress and its signing by the President and was not dependent upon any subsequent filing by the Secretary of Agriculture. Thus, section 2(a) establishes the SMNRA. The lands included therein are fixed by the map, dated August 2, 1992, and referred to in section 2(b). Indeed, section 2(e) expressly notes that should there be any discrepancy between the acreage figure and the map referenced in 2(b), that map controls as to the boundaries of the SMNRA. The fact that section 2(c) requires the filing of a map with the responsible Senate and House committees has no bearing under the SMNRA Act either on the establishment of the SMNRA or in delineating its boundaries.

It follows, therefore, that, upon the adoption by Congress and signing by the President of the SMNRA Act, all lands depicted on the map referenced in section 2(b) were withdrawn eo instante from entry and location under the mining laws as provided by section 8(a)(2) of the Act. We note that Lease does not dispute that the lands embraced by the two claims involved herein were shown to be within the SMNRA by that map. Since the claims at issue were not located until after the enactment of the SMNRA Act, they are necessarily null and void ab initio.

Lease's reliance on the asserted failure of BLM to update the land office records is, in this context, misplaced. While it is true that in Allen L. Brammon, Sr., 53 IBLA 251, 252-53 (1981), the Board noted that "[s]egregation of the [public] lands becomes effective on the date the proposed withdrawal is noted in the tract books or the official plats maintained in the proper office," that case involved the segregative effect accorded to an application for withdrawal of land. Where, as here, the withdrawal is effected by an Act of Congress, the withdrawal takes effect upon the affixing of the President's signature, unless otherwise provided by the Act. See Lutzenhiser v. Udall, 432 F.2d 328, 331 (9th Cir. 1970).

Assuming, *arguendo*, that Lease is correct in his assertion that the congressional withdrawal was not officially noted on the master title plat (MTP) until April 8, 1994, this would still make no difference to the outcome of the present appeal. Where Congress has withdrawn land by a legislative enactment, the Act of Congress, itself, gives notice to the world of the withdrawal. A failure to note the MTP or other public land records would merely prevent application of the "notation rule" as an independent basis for preventing entries on the land. ^{2/} It would not, however, vitiate the Congressional withdrawal which was effective independent from any notation. From the foregoing, it is clear that the lands embraced within

^{2/} In Carmel J. McIntyre (On Judicial Remand), 67 IBLA 317, 326-27 (1982), the Board discussed the historical derivation of the "notation" rule:

the Cal #1 and Cal #2 lode mining claims was not open to mineral entry on October 22 and 23, 1993, when the claims were located.

Accordingly, pursuant to the authority delegated to the Board of Land Appeals by the Secretary of the Interior, the decision appealed from is affirmed.

James L. Burski
Administrative Judge

I concur:

Will A. Irwin
Administrative Judge

fn. 2 (continued)

"The basics of the rule were encapsulized in the early Departmental decision California and Oregon Land Co. v. Hulen and Hunnicut, 46 L.D. 55 (1917). That case involved cancellation of patented entries by court decree. The Commissioner of the General Land Office had affirmed a decision of the Roseburg, Oregon, land office allowing applications for homestead entry by Hulen and Hunnicut on the basis of settlement prior to the date that the restoration of the lands in the canceled entries was noted on the record. In reversing the Commissioner's decision, the First Assistant Secretary stated:

"'[T]he orderly administration of the land laws forbids any departure from the salutary rule that land segregated from the public domain, whether by patent, reservation, entry, selection, or otherwise, is not subject to settlement or any other form of appropriation until its restoration to the public domain is noted upon the records of the local land office.' Id. at 57."

The Department's reliance on the notation rule was expressly affirmed in Shiny Rock Mining Corp. v. Hodel, 825 F.2d 216 (9th Cir. 1987).